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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 442

ELIZABETH L. CONRAD,
PETITIONER,

v.

GRAF BROS. INC., ET AL.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court Rules

Rule 19 2

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Questions Presented

1. Does the Petition for Writ of Certiorari present special and important reasons for granting the Petition.

2. Is the decision of the Court of Appeals a final judgment which is ripe for review.

3. Does the Petition present any grounds for overturning the decision of the Court of Appeals.

Argument

I. The Petition For Writ Of Certiorari Should Be Denied Because It Presents No Significant Legal Issues.

The only question presented by this Petition for Writ of Certiorari is whether the Court of Appeals was correct in ordering a new trial on the issue of damages. The case does not raise Constitutional or other questions of Federal Law, nor does it involve any principle "the settlement of which is of importance to the public as distinguished from that of the parties..." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79; Rule 19, Supreme Court Rules. Only the private litigants are interested in the outcome of this case.

While in the past this Court has granted Certiorari where the decision of a jury in a personal injury suit has been overruled by a lower court, it has also distinguished sharply between statutory negligence actions and the "ordinary common-law negligence action." *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 509-510. This case is an ordinary common-law negligence action. No facts make it different from the thousands of other personal injury cases which are brought in the Federal District Courts under their diversity of citizenship jurisdiction. The parties have had two opportunities to argue and brief the case at the appellate level. (Opinion of the United States Court of Appeals; P. 4, footnote 3.) There are no special or important reasons within the meaning of Rule 19, Supreme Court Rules, for this Court to grant the Petitioner a further hearing.

II. The Petition For Writ Of Certiorari Should Be Denied Because A Final Judgment Has Not Been Entered.

The Court of Appeals did not enter a final judgment in

this case. Rather, it affirmed the judgment as to liability but vacated the judgment as to damages and remanded the case for a new trial on the issue of damages only. (Opinion of the United States Court of Appeals, p. 8). When a Court of Appeals has remanded a case to the District Court for a new trial, this Court has uniformly stated that the case is not ripe for review and has denied the Petition for Certiorari. *Brotherhood of Locomotive Firemen and Engineers* v. *Bangor and Aroostook Railroad Co.*, 389 U.S. 327; *Slaker* v. *O'Connor*, 278 U.S. 188. Nor has this Court applied a different rule when a judgment for the plaintiff in a personal injury suit brought under the F.E.L.A. has been reversed and remanded for a new trial. *Banning* v. *Detroit, Toledo & Scranton R. Co.*, 173 F.2d 752, cert. denied 338 U.S. 815; *Dixon* v. *Atlantic Coast Line R. Co.*, 189 F.2d 525, cert. denied 342 U.S. 830; *Thomas* v. *Chesapeake & Ohio R. Co.*, 198 F.2d 783, cert. denied 344 U.S. 921; *Delaware, Lackawanna & Western R. Co.* v. *Siegrist*, 263 F.2d 616, cert. denied 360 U.S. 917; *Anderson* v. *Atlantic Coast Line R. Co.*, 267 F.2d 329, cert. denied 361 U.S. 841.

This case is not distinguishable from the cases cited above. There has been no final judgment entered and, therefore, the case presents no question for determination by this Court at this time.

III. The Petition For Writ Of Certiorari Should Be Denied Because The Court Of Appeals Correctly Decided The Issues Presented To It.

The Petitioner makes three arguments in support of her Petition:

1) the Court of Appeals has decided questions of fact and was in error to do so,

2) the Court of Appeals applied the wrong standard in deciding that the defendant did not use diligence in at-

tempting to obtain the missing Portsmouth Hospital Records,

3) the Court of Appeals placed the burden of proof upon the plaintiff on certain issues.

None of these arguments are supported by the record or the law.

1) The petitioner alleges that the Court of Appeals improperly decided certain questions of fact. But this Court has stated that the Court of Appeals may reverse findings of fact made by the trial court if "on all the evidence (it) is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Halzetine Research, Inc.*, 395 U.S. 100, 123. The Court of Appeals in this case stated that they had little doubt that the defendants were substantially prejudiced in dealing with the issue of damages by the failure of the plaintiffs to comply with the order of the court. (Opinion of the Court of Appeals, p. 7).

The following evidence supports the decision of the Court of Appeals. The Plaintiff's accident occurred on October 18, 1963. She received medical treatment only at the Portsmouth Naval Hospital, Portsmouth, Virginia from April, 1965 to April, 1968. (A. Vol. II, pp. 182-183). The complete Portsmouth Hospital record for this three-year period comprises 31 pages. (See Appendix A to this brief.) Of these, only 8 pages were introduced at the time of the trial by the plaintiff. (Appendix A to this brief.) The pages which were introduced cover the period April 28, 1965 — August 6, 1965. (Appendix A to this brief.) A copy of this portion of the hospital record was provided to the defendants at the time they were obtained by the plaintiff on April 18, 1966. Subsequent to April 18, 1966, the defendants filed a Motion for Hospital Records in which they prayed that the Court order the plaintiff to produce "Any and all records subsequent to August 6, 1965 of the Portsmouth Naval Hospital." (A. Vol. I., pp. 19-20). In the seven months between

September 11, 1967, and the date of trial, April 16, 1968, the plaintiff made no request of the Portsmouth Naval Hospital for her record subsequent to August 6, 1965. (A. Vol. I., pp. 41-42).

If this record had been produced at the time of trial, the missing pages of the Portsmouth Hospital Record would have directly contradicted the plaintiff's testimony on the extent of her disability. The plaintiff testified at the time of trial that she was required to wear a Thomas collar six to eight hours a day. (A. Vol. II, p. 149). She also gave the following testimony:

> Q. I see. Now, what happens to you when you don't wear the collar? What happens to your neck?
> A. I have — It hurts me. I cannot move it and that, and if I am not wearing the collar I have to hold my chin to keep — because it is so sore that without some kind of brace or something on it, I have to hold my chin here like this or something if I am not wearing the collar.
> (A. Vol. II, pp. 148-149)

A doctor called by the plaintiff, who had examined her for the first time on April 17, 1968, testified that motion in her neck was limited to 20-50% of the normal range of motion (A. Vol. II, p. 253.)

The entire Portsmouth Hospital record for the period April, 1965 — April, 1968 disclosed twenty-two outpatient visits by the plaintiff and two inpatient visits. (A. Vol. III, pp. 681-738). Nowhere in the entire record for this three year period is there any complaint of the type described by the plaintiff and her doctor at the trial. On the contrary, the record contains the following descriptions of her history and condition during her inpatient visits:

3-3-66 P.E.

> Physical examination on admission revealed a slightly thin, middle aged Caucasian female *in no distress. The remainder of the physical examination was within normal limits* except for heavy scarring along the anterior aspect on the left side of the neck, in the region of the previous thyroid incision. *There were no nodes palpable.* (A. Vol. III, p. 714)
> (Emphasis Added)

3-25-67 P.E.

> Physical examination revealed well developed, well nourished, white female, who was alert, cooperative and clinically euthyroid with a healed thyroid anterior neck incision. *There was no evidence of palpable nodes in the neck or supraclavicular areas. No thyroid gland was palpable.* The extremities revealed full range of motion of all fingers with a minute hard, immobile, tender, pointed projection on the radical aspect of the volar surface of the base of the proximal phalanx of the right fourth finger. (A. Vol. III, p. 716) (Emphasis Added.)

During the two inpatient visits, the plaintiff received constant nursing care and attendance for a total of seven days. Yet there is no mention of a Thomas collar or of any limitation or pain in the neck. Nor did the medical history which she gave mention the accident on October 18, 1963. (A. Vol. III, pp. 714, 716). These records are even more significant

when it is remembered that the plaintiff was being treated at the Portsmouth Hospital for a cancer of the thyroid gland in the neck. Thus, the examinations of the neck to detect the presence of any new cancer would have disclosed the limitations of motion and pain in the neck which the plaintiff described. The doctor even palpated her neck for other cancerous nodes without evoking any evidence of discomfort.

It is because the Portsmouth Hospital record so strongly contradicted the testimony of the plaintiff, that the Court of Appeals ordered a new trial on the issue of damages. This decision was the only fair and just one under the circumstances.

2) The plaintiff argues that the Defendants did not use due diligence in attempting to obtain the Portsmouth Hospital record. The argument overlooks the fact that the Defendant brought one motion for production of these records and, when only partial records were produced, brought a second motion which was allowed. (A. Vol. I. pp. 18-20). Once the second motion was allowed on September 11, 1967, the Defendants could reasonably expect that the Plaintiff would comply with the order of the Court. The Defendants were led to believe that the Plaintiff was making every effort to comply with this order and the Defendants objected when ordered to go to trial without these records. (Transcript of Hearing on Defendants' Motion for New Trial, pp. 8-9)

In determining whether a party has exercised due diligence, the actions of the opposing party are relevant. *Edgar* v. *Finley,* 312 F.2d 533 (CA 8th, 1963). In that case the Plaintiff's answers to the Defendant's interrogatories were misleading. In the present case, the Defendants were led to believe that the Plaintiff would produce the complete Ports-

mouth Hospital records. (Transcript of Hearing on Defendant's Motion for New Trial, pp. 8-9). It is ironic that the Plaintiff now argues that the Defendants should not have accepted the Plaintiff's word, but should have deposed the hospital or summoned in the records themselves. The Plaintiff was under an obligation to the Court and to the Defendants to comply with the Court's order of September 11, 1967. The Defendants could reasonably rely on the statements of Plaintiff's counsel that the Plaintiff would comply with this order. Due diligence did not require more of the Defendants.

The cases cited by the Petitioner do not establish a different standard from the one used by the First Circuit. In each case the Court decided whether the party used due diligence under all circumstances. There is, therefore, no conflict between the First Circuit and other Circuits.

3) The petitioner claims that the Court of Appeals incorrectly placed the burden of proof upon the Plaintiff in three instances. These contentions are not supported by the record.

First, the Court of Appeals accepted the statements of Defendant's counsel that a continuance had been requested. (Transcript of Hearing on Defendant's Motion for New Trial, pp. 8-9). These statements were made in the presence of Plaintiff's counsel and the Trial Court, and were not contradicted by either. They were sufficient evidence to support the finding that Defendants' counsel objected to going to Trial without the complete Portsmouth Hospital records.

Second, the Plaintiff now argues that the Defendants must prove that they did *not* have the Portsmouth Hospital record. This implies that the Defendants had somehow procured this record prior to trial, and did not use it at the time of trial. This position is contradicted by the letter

from LCDR. Kemp, which says that only one request was received for this record. (A. Vol. I pp. 41-42). Nor does the Plaintiff suggest how the Defendants could have obtained the Plaintiff's hospital record from an out-of-state Navy Hospital without written authorization of the Plaintiff.

Finally, it should be noted that this argument was pressed by Plaintiff's counsel before the Court of Appeals (Opinion of the Court of Appeals, p. 4). In those arguments Plaintiff's counsel claimed that references in the record proved that the Defendants had the entire Portsmouth Hospital record at the time of trial. The Court of Appeals continued the oral argument from the March to the April sitting, after oral arguments had been made in the March sitting, so that the Plaintiff could document this contention from the record. (Opinion of the Court of Appeals p. 4, footnote 3). Since the argument was raised by the Plaintiff as a basis for supporting the judgment in her favor, the Plaintiff had the burden or supporting the argument with references to the record. She was unable to do so then, and has not done so now.

Third, Plaintiff's counsel say that they tried in good faith to procure the Portsmouth Hospital Record. However, the letter referred to by the Plaintiff indicates that the subpoena was issued on April 15, 1968. (A. Vol. III p. 793). *This was one day before trial began.*

The Court of Appeals understood the subpoena procedure as well as the trial Court. However, it decided that Plaintiff's counsel had not done what was reasonable to comply with the Court's order of September 11, 1967, that Defendant's counsel had used due diligence in attempting to obtain these records, and that the failure of the Plaintiff to produce these records was prejudicial to the Defendants. These findings were fully supported by the record.

Conclusion

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

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With him on the Brief:
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APPENDIX A

Portsmouth Naval Hospital Record For Treatment From April 28, 1965 — August 6, 1965

Complete Record	*Introduced at Trial*[1]	*Missing Pages*
P. 701	P. 701	711
702	702	713
704 (729)	704 (729)	727
705	705	735
706	706	(4 pages)
707	707	
709	709	
711	726	
713	(8 pages)	
726		
727		
735		
(12 pages)		

1. These pages are designated Appellants' Supplemental Appendix and were transmitted by a letter dated 18 April 1966.

Portsmouth Naval Hospital Record For Treatment From August 7, 1965 — April 16, 1968.

Complete Record	*Introduced at Trial*	*Missing Pages*
pp. 696-700	None	All
703		
708		
712		
714		
716-722		
728		
737		
738		
(19 pages)		

TOTALS		
31 Pages	8 Pages	23 Pages